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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 457

BROOKLYN WATERFRONT TERMINAL CORPORATION,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

CHESTER T. LANE,
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THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Brooklyn Waterfront Terminal Corporation prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above entitled case on June 5, 1950.

Opinions Below

The opinion of the Court of Claims (R. 56-70) and the dissenting opinion of Judge Madden (R. 70-72) are reported in 90 F. Supp. 943.

Jurisdiction

The judgment of the Court of Claims was entered on June 5, 1950 (R. 72). A motion for a new trial was seasonably filed by the plaintiff in the Court of Claims on June 26, 1950, and overruled by order entered on October 2, 1950

(R. 72). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1255(1).

Question Presented

The United States as lessee failed to maintain petitioner's property in good repair and tenantable condition as required by a covenant in the lease. The question presented is whether the court below erred as a matter of law in limiting the liability of the United States for its default to the amount necessary to put the property in good repair for the purposes of the United States under the lease, as distinguished from good repair and tenantable condition for the purposes required in the conduct of petitioner's business.

Statement

Property owned by petitioner and used by it for commercial terminal and storage operations involving bagged and perishable foodstuffs such as sugar, coffee and cocoa (R. 60) was leased by it to the United States on January 5, 1943 (R. 56). Following certain modifications, extensions, and renewals not now relevant, the lease was duly terminated by the United States on December 31, 1947 (R. 56). Under the terms of the lease the property was leased "for naval purposes" (R. 56), and throughout the period involved in this suit it was used by the United States exclusively for the storage of naval supplies under jurisdiction of the Supply Department of the New York Naval Shipyard, Brooklyn, N. Y. (R. 58).

The lease was executed on a printed form identified as "United States Standard Form No. 2" (R. 43-44). This form contains a standard provision (paragraph 9) placing upon the *lessor* the responsibility for maintaining the leased property "in good repair and tenantable condition . . . except in case of damage arising from the act or the

negligence of the Government's agents or employees" (R. 44). In this case, however, paragraph 9 was deleted by mutual consent before execution, and a new paragraph 12 inserted, reading as follows:

> The Government shall maintain the said premises, buildings, equipment, piers, bulkheads, slips and appurtenances in good repair and tenantable condition during the continuance of this lease. (R. 44-45.)[1]

During the course of the lease petitioner repeatedly complained of the failure of the United States to comply with its obligation of maintenance under paragraph 12 (R. 59), and at the termination of occupancy instituted this action to recover damages from the United States by reason of its default. Following the trial of the issues the court below found as a fact that the United States had subjected the property to heavy use, and that at the termination of the lease it was not in good and tenantable condition as required thereby (R. 60). The court found that just compensation to petitioner for repair of the property to good and tenantable condition for the purposes required in the conduct of petitioner's business would be the sum of $172,321.62 (R. 55, 60).[2] However, the court also found that the

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[1] The lease as executed retained the standard paragraph 8, permitting the United States "to make alterations, attach fixtures, and erect additions, structures, or signs, in or upon the premises," and providing further that such "fixtures, additions, or structures . . . shall be and remain the property of the Government and may be removed therefrom by the Government prior to the termination of this lease, and the Government, if required by the Lessor, shall, before the expiration of this lease or renewal thereof, restore the premises to the same condition as that existing at the time of entering upon the same under this lease. . . . ." (R. 44). No claim under this paragraph is presented by this petition for a writ (R. 59, 62).

[2] At the trial petitioner adduced evidence tending to show that the sum necessary for this purpose would be $250,379.43 (R. 54). The court below accepted the basis of petitioner's computations (R. 54), but found certain of the items not to be established by the weight of the evidence (R. 55). The propriety of the disallowance of these items is not sought to be raised by this petition for a writ.

sum required to put the premises in good repair and tenantable condition for the purposes for which leased, namely, naval purposes, would require an expenditure of only $33,319 (R. 53, 60). Regarding the selection as between these two bases of compensation as "the principal issue of law" (R. 60), the court (Madden, J., dissenting) adopted the latter, and accordingly awarded petitioner the sum of $33,319 (R. 70).[3]

Reasons for Granting the Writ

1. In reaching its conclusion the court below started from the premise that "the applicable law is federal, rather than State, although in absence of federal cases in point the courts may properly turn for guidance to the general law of landlord and tenant" (R. 64). In this the court was in accord with *Girard Trust Co.* v. *United States,* 149 F. 2d 872, 874, 161 F. 2d 159, 161 (C.A. 3rd).

This Court has in recent years given careful consideration in a series of cases to the question of when federal as contrasted with state law should be regarded as applicable in disputes between the United States and private citizens, and to the question how far state court decisions should be consulted and followed in the absence of federal precedents. *Clearfield Trust Co.* v. *United States,* 318 U. S. 363; *United States* v. *Allegheny County,* 322 U. S. 174; *National Metropolitan Bank* v. *United States,* 323 U. S. 454. As yet, however, the Court has not so far as we are aware spoken on the matter in the specific field of government leases of real estate, and we submit that the question is not necessarily concluded by decisions dealing with other types of government obligations. It is by no means clear that the same

[3] The dissenting judge, while accepting petitioner's view of the law, questioned the complete validity of petitioner's cost estimates, and voted for an award of $80,000, a figure not reflected in the testimony of either side (R. 72).

considerations which call for uniformity in the interpretation of government commercial or procurement contracts generally are present in the field of government real estate leases; for the ownership and leasing of real estate present peculiarly local problems which throughout our jurisprudence are traditionally dealt with on principles locally evolved.[4] The effect of the decision below is to deprive a New York landlord, who has contracted in New York with respect to New York real estate, of the rights to which he would have been entitled had he been contracting with a private individual or concern rather than with the Government of the United States. Whether the federal courts should be permitted to create a favored status for the United States when it chooses to bargain at arm's length for the use of privately owned real estate presents, we submit, an important question of federal law which has not been, but should be, settled by this Court.

We do not have access to any statistics showing the extent to which the United States has adopted the practice of deviating from its standard form lease in the respects involved here and in *Girard Trust Co.* v. *United States, supra;* but we take the liberty of suggesting that in the currently developing war economy, with its concomitant need for secrecy in Government operations, the United States is likely to increase its use of lease covenants designed, as here, to keep the landlord off the premises during their Government use, —especially if the decision below is allowed to stand. Landlords who will be asked to enter into such leases should, we submit, be given the advantage of an authoritative determination by this Court as to the nature of their rights and remedies.

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[4] The local nature of the problems is recognized in the commonly known practice by which real estate leases are customarily negotiated for the United States by attorneys skilled in the real estate law and customs of the locality.

2. The decision below conflicts, in principle at least, with the decision of the Court of Appeals for the Third Circuit in *Girard Trust Co.* v. *United States,* 161 F. 2d 159, *supra.* There the court, on the authority of the New York and other precedents on which petitioner relied below, explicitly held that the obligation of the United States to repair and maintain applied to a defect shown to have existed at the time the property was leased. This conclusion was based upon the doctrine, well established in British and New York law and not apparently deviated from elsewhere, that a landlord seeking damages for failure of maintenance under such a covenant is under no necessity to establish original condition as a prerequisite of recovery.[5] In the instant case the court below recognized that on the basis of a similar holding here the petitioner would be entitled to prevail, but rejected the doctrine as "extreme". "That such may have been the effect of the judgment of courts in some jurisdictions does not warrant us in making the same mistake" (R. 66).

We may note here that there may be some logical inconsistency between the holding of the court below discussed in the foregoing paragraph, and its statement earlier in the opinion (R. 60) that "the principal issue of law" was whether the property should have been maintained in condition for petitioner's purposes or for those of the United States. The latter issue, as stated by the court, would appear to dispense with any question of whether establishment of original condition was necessary. However, even on the latter issue the decision would appear equally clearly to

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[5] The obligation of the tenant is expressed in *Lehmaier* v. *Jones,* 100 App. Div. (N. Y.) 495, 91 N. Y. Supp. 687, as being "not only to keep the premises in as good repair as when he enters, but to put, keep and leave in good repair, having due regard to the age and class of the buildings." The doctrine stems from the leading English case of *Payne* v. *Haine,* 16 Meeson & Welsby 541.

conflict with the opinion in *Girard Trust*. Though the point was not expressly discussed, it appeared that the repairs in *Girard Trust* were necessary for the purposes of the landlord, since the landlord had been required to make them at the insistence of the local fire insurance underwriters rating bureau; and it was equally clear that they were not necessary for purposes of the United States, for the United States had declined to make them on demand, and contended in its brief on appeal that in so far as they involved tenantability the question whether they needed to be made was a matter of concern only to it, and not to the landlord.[6] The United States was nevertheless held liable.

It is true that the court below sought to distinguish the *Girard Trust* case on its facts, but we believe the purported distinction ineffective to avoid the conflict. Moreover, the purported distinction is not persuasive on its face. No reason is assigned by the court below for its conclusion that a covenant to "maintain, repair, operate and service the building" is so much more "absolute" than one to "maintain the said premises in good repair and tenantable condition" as to require a different construction (R. 67). Some indefinite weight is put by the court below upon the fact that our lease retained the standard restoration clause of paragraph 8 (see note 1, *supra*) whereas that section had been stricken in the *Girard Trust* lease. However, it is plain that as drafted in the printed form paragraph 8 could have had no bearing upon the scope of the Government's duty to repair, since under the standard form of lease the Government had no such duty; and the meaning of the language used cannot have been altered by the parties'

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[6] "In so far as the defects affected the safety of the persons occupying the building, the matter was not one of concern for the landlord." Gov't Brief, p. 15.

decision to change the standard paragraph 9.[7] It is equally plain that the absence of such a paragraph in the *Girard Trust* case was not regarded by the parties or the court there as of any significance.

We respectfully submit that the purported factual distinction is outweighed by the express concession of the could below that the New York authorities followed in *the Girard Trust* case would, if sound, be likewise controlling here (R. 66). The court below, we believe, merely resorted to a device to avoid the appearance of conflict with a circuit court decision which it was unwilling to follow.

3. Seeking federal precedents other than the *Girard Trust* case, the court below applied as controlling authority the decision of this Court in *United States* v. *Bostwick,* 94 U. S. 53, and the line of its own decisions stemming from that case (R. 66, 67-69). The decision in the *Bostwick* case, as the court below recognized, dealt with the common law obligation of a tenant, in the absence of an express provision to the contrary, not to commit voluntary waste. Its application here amounted to, and was recognized by the court below as, holding that petitioner, in bargaining for and securing a Government covenant to maintain its property, got no more than it would have had at common law in the absence of any covenant whatsoever (R. 69). Such a decision, not only resulting in patent injustice in the case at bar but threatening to establish an unsound precedent in an important area of government contract law, constitutes a misapplication of a decision of this Court which we submit should call for review by this Court on writ of certiorari.

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[7] The plain impact of paragraph 8 was merely to require the Government, on request, to *remove* additions of the type which by the first sentence of the paragraph it was empowered to erect.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CHESTER T. LANE,
Counsel for Petitioner

December 13, 1950.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 457

BROOKLYN WATERFRONT TERMINAL CORPORATION, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Claims (R. 56-72) are reported in 90 F. Supp. 943.

JURISDICTION

The judgment of the Court of Claims was entered June 5, 1950 (R. 72). Plaintiff's motion for a new trial was filed June 26, 1950 and overruled on October 2, 1950 (R. 72). The petition for a writ of certiorari was filed on December 14,

1950. The jurisdiction of this Court rests upon 28 U.S.C. sec. 1255.

QUESTION PRESENTED

Whether under a lease of property to the United States for "Naval Purposes," the United States is liable for the cost of putting the petitioner's property in good repair and tenantable condition for the plaintiff's purposes in conducting a commercial warehouse business involving the storage of bagged and perishable foodstuffs, rather than the cost of putting the property in good repair and tenantable condition for the purposes for which the property was leased such as storage of naval gear and equipment.

STATEMENT

This suit was brought to recover damages for the alleged breach of covenants by the United States to maintain the petitioner's premises in good repair and tenantable condition and to restore the premises to the same condition as that existing at the time the Government entered upon the property in accordance with the terms of leases between the parties. As will appear more fully later, petitioner waived any claim based upon the covenant to restore and does not now seek review of claims as to various items which the Court disallowed as not supported by the weight of the evidence (Fdg. 26, R. 55, Pet. p. 3, fns. 1, 2). The facts material to the question sought to be reviewed, as

found by the Court of Claims may be summarized as follows:

On January 5, 1943, petitioner leased to the United States certain commercial warehouse property. The lease, which provided that the premises were to be used exclusively for "Naval Purposes", was renewable by the United States from year to year and was subject to cancellation by the Government upon 30 days' notice in writing. The United States duly renewed and extended the lease for successive annual periods to and including June 30, 1947. (R. Fdgs. 2, 3, R. 42-43.)

On July 1, 1947, the parties entered into a new lease covering approximately half of the storage space previously rented under the lease of January 5, 1943 (Fdg. 4, R. 43). The new lease was for the period July 1, 1947, to June 30, 1948. It also provided that the premises were to be used exclusively for "Naval Purposes". It contained the same provisions as to renewal and cancellation as the previous lease of January 5, 1943. This lease was duly terminated by the United States on December 31, 1947. (Fdg. 4, R. 43.)

Both leases contained the following provisions (Fdgs. 5, 6, R. 44-45):

> 8. The Government shall have the right, during the existence of this lease, to make alterations, attach fixtures, and erect additions, structures, or signs, in or upon the

premises hereby leased (provided such alterations, additions, structures, or signs shall not be detrimental to or inconsistent with the rights granted to other tenants on the property or in the building in which said premises are located); which fixtures, additions, or structures so placed in or upon or attached to the said premises shall be and remain the property of the Government and may be removed therefrom by the Government prior to the termination of this lease, and the Government, if required by the Lessor, shall, before the expiration of this lease or renewal thereof, restore the premises to the same condition as that existing at the time of entering upon the same under this lease, reasonable and ordinary wear and tear and damages by the elements or by circumstances over which the Government has no control, excepted: Provided, however, that if the Lessor requires such restoration, the Lessor shall give written notice thereof to the Government thirty [1] days before the termination of the lease.

* * * * *

12. The Government shall maintain the said premises, buildings, equipment, piers, bulkheads, slips and appurtenances in good repair and tenantable condition during the continuance of this lease.

The premises were used by the United States exclusively for the storage of naval supplies and

[1] In the lease of July 1, 1947, there is a blank space between the words "Government" and "days," no number having been inserted.

during the Government's occupancy of petitioner's premises the sum of $100,851.66 was expended by the United States to improve and maintain the premises in good repair and tenantable condition for naval purposes (Fdgs. 14, 15, R. 50, 51).[2]

On March 17, 1947, and May 21, 1947, the petitioner wrote to the Commandant, Third Naval District, New York, requesting that repairs be made to the leased premises, and on December 10, 1947, in acknowledging the notice of termination of the lease of July 1, 1947, petitioner made demand for restoration and requested that repairs be undertaken (Fdgs. 9-10, R. 46-47). On January 13, 1948, the petitioner demanded prompt restoration and repair of the property and particularly the repair of leaders, gutters and roofs (Fdg. 10, R. 47). This letter was acknowledged on January 19, 1948, by an officer of the Government who stated, *inter alia* (Fdg. 10, R. 48):

> With respect to the alleged damaged condition of leaders, gutters, and roofs you are advised that the Navy Department does not propose to make any repairs to the premises but, should it be determined that a legal responsibility exists for such repairs to be made, you will be reimbursed for a reasonable cost of making such repairs to the property as are deemed necessary.

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[2] This sum included repairs to portions of the premises which are not involved here because they had been returned to the owners at various times in 1946 and 1947 and at the time of return, the United States was released of all liability as to those portions (Fdgs. 8, 15, R. 46, 51).

The court below found that "The proof adduced * * * establishes that the premises were kept in good repair and tenantable condition for the purposes for which the property was leased by the defendant, namely, naval purposes, such as storage of heavy gear and equipment" with certain exceptions which would cost an estimated $33,319.00 to repair (Fdg. 20, R. 53). The court below further found that to put the property in good repair and tenantable condition for the purposes required in the conduct of the petitioner's business (the conduct of commercial terminal and storage operations involving bagged and perishable foodstuffs such as sugar, coffee, and cocoa) would cost $172,321.62 (Fdgs. 21, 26, R. 54, 55). The court concluded that as a matter of law the petitioner was entitled to recover the sum of $33,319.00 (R. 55-56). The court's reason for this conclusion was, briefly, that under paragraph 12 of the lease, the United States was only required to maintain the premises in good repair and tenantable condition for the purposes for which the property was leased, any claim to restoration of the property to the condition it was in at the date of the lease having been waived and no evidence having been offered by the plaintiff as to the condition of the property at the inception of the lease. Judge Madden dissented (R. 70-72).

ARGUMENT

Petitioner's argument in support of its claim to $172,321.62, rather than the $33,319.00 which has been awarded by the Court of Claims, is based on the theory that the United States was obligated to put the premises in good and tenantable condition for petitioner's purposes and to keep it so, even if it were not in such condition when leased. (Cf. R. 66.) As the court below said (R. 66), this is "an extreme view and hardly within the contemplation of the parties as shown by the leases themselves and the circumstances surrounding their execution." Petitioner makes no attempt to show that the court's construction of the lease is erroneous under the circumstances, particularly the absence of any showing of the condition of the property at the time of the lease.[3] Thus, petitioner's position is that, regardless of the circumstances, the law requires that paragraph 12 be construed to impose such an extraordinary liability upon the United States. The authorities cited do not support such a view nor do they create a conflict of decision.

As the Court of Claims pointed out (R. 66-67), both the issue presented and the lease provision involved in *Girard Trust Co.* v. *United States,* 161 F. 2d 159 (C.A. 3), were different from those in the instant case and even petitioner is forced to ad-

[3] The dissenting opinion does not aid petitioner since it is based on the assumption that the property was in good repair and tenantable condition for commercial warehouse purposes, although petitioner made no attempt to prove that fact.

mit (Pet. p. 7) that the point here involved "was not expressly discussed" in the *Girard* case. The difference in wording of the covenants to repair and the absence, in the *Girard* case, of a covenant to restore cannot, as petitioner seeks (Pet. pp. 7-8), be ignored. We submit that the court below was plainly correct when it stated that while a lessee could be bound to repair pre-existing defects "it seems to us it ought to be spelled out with positive language and unrestricted by the covenants, as in the *Girard* case" (R.67).

Recognizing that the *Girard* case holds that this issue of construction of a federal contract is not controlled by the law of the place where the property is situated, petitioner nevertheless urges, without citation of supporting authority, that local law should conclude the matter. However, to support the view that New York law compels the construction urged by it, petitioner cites only one New York decision, *Lehmaier* v. *Jones,* 100 App. Div. 495, 91 N.Y. Supp. 687. But, aside from the fact that the lease covenants and the other circumstances were different from those presented here, that case is, at best, of doubtful authority, since *Lockrow* v. *Horgan,* 58 N.Y. 635, upon which it relies, had been in substance overruled by *May* v. *Gillis,* 169 N.Y. 330 (cf. R. 66). Apart from this one citation, petitioner makes no attempt to show that the analysis of the New York law by the Court of Claims was erroneous or that New York law is

different from that generally prevailing elsewhere (cf. R. 64-65).

Finally, petitioner's claim (Pet. p. 8) that an important question of federal law is presented because of reliance by the court below on *United States* v. *Bostwick,* 94 U.S. 53, when that case involved common law liability rather than an express covenant, plainly lacks merit since the Court of Claims recognized (R. 65-66) that the *Bostwick* case did not involve an express covenant.

CONCLUSION

The decision of the court below is clearly correct and the case does not warrant review by this Court. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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